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No. 804

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1959

NELLIE DAVENPORT, Administrator of the Estate of Earl Davenport, Deceased, and NELLIE DAVENPORT,
Petitioners

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nellie Davenport, individually, and as Administrator of the Estate of Earl Davenport, deceased, by her Attorneys, G. W. Horsley, Harold M. Olsen and Herbert L. Cantrill, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit (R-90), reversing the judgment of the District Court.

Opinions Below

The Opinion of the Court of Appeals (Appendix A) is reported at 273 F. 2d, 231.

The Opinion of the District Court (R-47) is reported at 173 F. Supp. 475.

Jurisdiction

The judgment of the Court of Appeals was entered on December 21, 1959 (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1), and Rule 19, Supreme Court Rules.

Questions Presented

(1) Whether, as a matter of law, the District Court erred in concluding that, for Federal income tax purposes, a payment to a divorced spouse for release of her inchoate right to dower and homestead in real estate, may properly be added to the basis of property in determining gain or loss from its sale.

(2) Whether, on the basis of the stipulated record made, the District Court erred in concluding that the tax-payers had sustained their burden approving what portion of the $52,000.00 payment, if any, was for the release of the inchoate dower and homestead rights in the property sold.

(3) Whether the stipulation supports the District Court's finding that the tax-payers unadjusted cost basis for the property sold was $66,575.25.

STATUTES AND REGULATIONS INVOLVED

Chapter 3, 1957 Illinois Revised Statutes:

Dower

Sec. 11, Par. 162. The intestate real and personal estate of a resident decedent and the intestate real estate in this State of a non-resident decedent after all just claims against his estate are fully paid, descends and shall be distributed as follows:

First, when there is a surviving spouse and also a descendant of the decedent: one-third of the personal estate and one-third of each parcel of real estate to the surviving spouse and the remaining two-thirds to the decedent's descendants per stirpes but, if the surviving spouse elects to take dower in any parcel of real estate as provided in Section 19, the one-third of the parcel vested at the decedent's death in the surviving spouse is thereupon divested and such descendants thereupon become vested with the entire parcel subject to the dower of the surviving spouse.

Third, when there is no descendant but a surviving spouse and also a parent, brother, sister or descendant of a brother or sister of the decedent, the entire personal estate and one-half of each parcel of real estate to the surviving spouse and one-half of each parcel of real estate to the parents, brothers and sisters of the decedent in equal parts allowing to the surviving parent, if one is dead, a double portion and to the descendants of a deceased brother or sister per stirpes the portion which the deceased brother or sister would have taken if living, but, if the surviving spouse elects to take dower in any parcel of real estate as provided in Section 19, the one-half of

the parcel vested at the decedent's death in the surviving spouse is thereupon divested and such other persons thereupon become vested with the entire parcel subject to the dower of the surviving spouse.

Fourth, when there is a surviving spouse but no descendant, parent, brother, sister or descendant of a brother or sister of the decedent, the entire estate to the surviving spouse, but if the surviving spouse elects to take dower in any parcel of real estate as provided in Section 19, all of the parcel vested at the decedent's death in the surviving spouse is thereupon divested and the entire parcel, subject to the dower of the surviving spouse, thereupon becomes vested in the decedent's nearest kindred as provided in rule sixth, or if there is no known kindred, escheats as provided in rule seventh.

Sec. 18, Par. 170. A surviving spouse, whether husband or wife, may become endowed of a third part of all real estate of which the decedent was seized of an estate of inheritance at any time during the marriage by electing to take dower therein as provided in Section 19 unless the right to elect to take dower has been released or is barred. The right to elect to take dower shall not limit the interest vested in the surviving spouse under Section 11, 12 or 16 unless and until such right is exercised as provided in Section 19. Real estate contracted for by the deceased spouse in his lifetime, the title to which may be completed after his death, and equitable estates are subject to the right to elect to take dower. There is no estate of curtesy. As amended by act approved July 9, 1951.

Sec. 21, Par. 173. A spouse who is divorced for the fault of the other spouse is not thereby barred of the right to elect to take dower in the real estate owned by the other spouse during the marriage, except where the marriage

is void from the beginning; but a spouse who is divorced for his own fault is barred of the right to elect to take dower and other estate granted by the laws of this state in the real and personal estate of the other spouse. As amended by act approved July 9, 1951, L. 1951, p. 974.

Sec. 23, Par. 174. Except as otherwise provided by this Act, no judgment or decree, confessed or recovered against one spouse and no laches, defaults, covin, forfeiture or crime of one spouse and no deed or conveyance of one spouse prejudices the right of the other spouse to elect to take dower as provided in Section 19. As amended by act approved July 9, 1951. L. 1951, P. 974.

Sec. 24, Par. 175. One spouse may release his right to elect to take dower in real estate of the other spouse by joining with the other spouse in any written instrument relating to the sale, mortgage, conveyance or other disposition of that real estate. When the interest of one spouse in real estate has been divested by any written instrument or by process of the law, the other spouse, by a written instrument signed by him, may release his right to elect to take dower therein to the grantee, mortgagee, purchaser, or those claiming under him.

When a person sells and conveys real estate pursuant to a decree of a Court or to a power contained in a will, he does not thereby release any right to elect to take dower in the real estate unless its release is specifically set forth in the deed of conveyance. As amended by act approved July 9, 1951. L. 1951, p. 974.

Sec. 25, Par. 176. If real estate is conveyed or mortgaged by one spouse during his lifetime without release of the right to elect to take dower by the other spouse, the latter is barred of the right to elect to take dower

therein as against the grantee or mortgagee or those claiming under them unless the surviving spouse elects to take dower therein in the manner and within the time provided in Section 19. As amended by act approved July 9, 1951. L. 1951, p. 974.

Homestead

Chapter 52, 1957 Illinois Revised Statutes:

Section 1.

Every householder having a family, shall be entitled to an estate of homestead, to the extent in value of $2,500, in the farm or lot of land and buildings thereon, owned or rightly possessed by lease or otherwise, and occupied by him or her as a residence; and such homestead, and all right and title therein, shall be exempt from attachment, judgment, levy or execution, sale for the payment of his debts, or other purposes, and from the laws of conveyance, descent and devise, except as hereinafter provided. As amended by act approved July 11, 1957, L. 1957, p. H.P. No. 1271.

Section 2.

Such exemption shall continue after the death of such householder, for the benefit of the husband or the wife surviving, so long as he or she continues to occupy such homestead, and of the children until the youngest child becomes twenty-one years of age; and in case the husband or wife shall desert his or her family, the exemption shall continue in favor of the one occupying the premises as a residence.

Section 4.

No release, waiver or conveyance of the estate so exempted, shall be valid unless the same is in writing, subscribed by the householder and his or her wife or husband, if he or she has one, and acknowledged in such manner as conveyances of real estate are required to be acknowledged, or possession is abandoned or

given pursuant to the conveyance; . . . Provided that where a conveyance is made by a husband, who as such householder to his wife, or by a wife who is such a householder as grantor to her husband, such conveyances shall be effectual to pass the title expresses therein to be conveyed thereby whether the grantor in such conveyance is joined therein by such wife or husband, as the case may be, or not . . . .

Internal Revenue Code

Sec. 111. Determination of Amount of, and Recognition of, Gain or Loss.

(a) Computation of gain or loss—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113 (b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(26 U.S.C. 1952 ed., Sec. 111.)

Sec. 113. Adjusted Basis for Determining Gain or Loss.

(a) Basis (Unadjusted) of Property—The basis of property shall be the cost of such property; except that—

(5) Property transmitted at death.

If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition.

• • •

(b) Adjusted basis—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

(1) (as amended by Sec. 130 (b), Revenue Act of 1942, Supra, and Sec. 204 (b), Revenue Act of 1950,

C. 994, 64 Stat. 906) General Rule. Proper adjustment in respect of the property shall in all cases be made—

(A) For expenditures, receipts, losses, or other items, properly chargeable to capital account, but no such adjustment shall be made for taxes or other carrying charges, or for expenditures described in Section 23 (bb), for which deductions have been taken by the taxpayer in determining net income for the taxable year or prior taxable years; * * *

(26 U.S.C. 1952 ed., Sec. 113)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.23(a)—15 Nontrade or Nonbusiness Expenses.—(b) * * * *

Expenditures incurred in defending or perfecting title to property, in recovering property (other than investment property and amounts of income which, if and when recovered must be included in income), or in developing or improving property, constitute a part of the cost of the property and are not deductible expenses. Attorneys' fees paid in a suit to quiet title to lands are not deductible; but if the suit is also to collect accrued rents thereon, that portion of such fees is deductible which is properly allocable to the services rendered in protecting or asserting one's rights to property of a decedent as heir or legatee, or as beneficiary under a testamentary trust, are not deductible expenses. * * *

Sec. 29.42-2—Capital Expenditures.—

Amounts paid for increasing the capital value or for making good the depreciation (for which a deduction has been made) of property are not deductible from gross income. (See Section 23 (l).). Amounts expended for securing a copyright and plates, which remain the property of the person making the payments, are investments of capital. The cost of defending or perfecting title to property constitutes a part of the cost of the property and is not a deductible expense. * * *

STATEMENT

This case was originally commenced by the Illinois National Bank, a Banking Corporation, as Conservator of the estate of Earl Davenport, an incompetent person, and Nellie Davenport, against the United States of America, for a refund of an alleged over-payment of $15,231.12 in Federal Income Taxes for the year 1948. (R-5, 47, 88.)

Upon the death of Earl Davenport, Nellie Davenport, as Administrator of the estate of Earl Davenport, deceased, was substituted (Appendix A). The facts, as found by the District Court (R-47-86) may be summarized as follows:

Prior to July 25, 1947, Earl Davenport and Mayme Davenport were husband and wife (R-27-34, 48); on July 18, 1947 Earl and Mayme Davenport entered into and executed a "Post-Nuptial Stipulation and Settlement of Property Rights" which provided for the division of their respective properties. (R-14, 20-21, 25, 48.)

Thereafter, on July 25, 1947, the Circuit Court of Sangamon County, Illinois, entered a decree dissolving the marriage between Earl and Mayme Davenport, incorporating and approving the Post-Nuptial agreement (R-14, 29-30, 34, 54-55).

Subsequent to the issuance of the Divorce Decree, Earl and Mayme Davenport carried out the provisions of the contract and decree by executing Quit Claim deeds in favor of the other, in respect to their separate properties (R-21, 36-39, 43-46, 59-61), and on August 7, 1947, Earl Davenport paid Mayme Davenport $52,000.00 by check which recited that it was "full settlement of payments due under divorce decree and post nuptial agreement" (R-14, 35, 74).

A farm which Earl Davenport owned at the time of the settlement and divorce, was sold on January 3, 1948, by Earl Davenport and his present wife, Nellie Davenport, for $120,221.75 (R-12-13, 15, 40-41, 47, 59-61). In their joint return filed for the year 1948, the taxpayers set up as part of the cost basis the $52,000.00 payment made to Mayme Davenport (R-15, 17, 47-48). The $52,000.00 item was disallowed. On April 17, 1952, Commissioner of Internal Revenue made timely assessment of a deficiency in tax in the amount of $12,747.66, plus interest of $2,483.46. The total deficiency was paid, and on October 11, 1955 the taxpayers filed a timely claim for refund, which was denied on September 10, 1956. This suit for refund followed. (R-13, 48.)

None of the facts in the record before the District Court are in dispute and based upon this stipulated record, the District Court found that, of the $52,000.00 paid to Mayme Davenport, $5,000.00 was paid for her attorney's fees and was not attributable to the cost of acquisition of the land, but that "$47,000.00 was paid for release of her dower, homestead and rights of inheritance" and concluded that "the Director of Internal Revenue erred in disallowing the said $47,000.00 as a cost of acquisition basis." (R-87-88.) Judgment was entered against the United States on April 8, 1959 and notice of appeal was filed by the Government on June 5, 1959. (R-88-89.)

The Circuit Court of Appeals reversed the District Court, and has apparently predicated its decision on the assumption that the former wife's inchoate right of dower is a mere expectancy and is not a vested right. It also found that the $52,000.00 payment was a lump sum settlement of a marital dispute, and relied upon the case of O'Malley vs. Yost, 8th Circuit 186, Federal 2d, 603, in

which case the Court found that a payment made to an "estranged" wife to induce her to join in a conveyance of land was not "an expense of sale" within the meaning of the revenue laws.

Reasons for Granting the Writ

(1) The Circuit Court of Appeals, in arriving at its decision, apparently failed to consider that in Illinois the wife's right of inchoate dower and homestead, are valuable and substantial rights. These rights are enumerated in the Illinois Probate Act, Chapter 3, Illinois Revised Statutes, Sections 11, 18, 21, 23, 24 and 25.

In the case of *Pearson vs. Adams*, 394 Illinois 391, 68 N.E. 2d 799, the Court held at page 396:

> "It is well settled that an inchoate right of dower is an encumbrance within the terms of a covenant to convey by good and sufficient warranty deed."

In the case of *McCord vs. Massey*, 155 Illinois 123, 39 N.E. 2d, 592, the Court said:

> "A right of dower is an encumbrance, within the terms of that covenant, and it is immaterial whether the right of dower is inchoate or consummate."

It is equally clear that unless the homestead estate of the wife was disposed of by a property settlement, contract or divorce decree, the homestead estate of the wife would be a cloud upon the title to the extent of $1,000.00, (the statutory value in 1948), and that a husband must clear the homestead right in order to convey merchantable title.

Maher vs. Goff, 316 Ill. 605, 608, 147 N.E. 427, 428.

(2) The Circuit Court, relying on the case of *O'Malley vs. Yost*, 8th Circuit 186, Federal 2d, 603, did not distinguish between an "estranged wife" and a person whose

marital ties have been completely severed by a divorce, and failed to take into account the fact that the $47,000.00 paid was set up as a "cost basis" and not "an expense of sale" as was held in the said O'Malley case.

Moreover, we call to the Court's attention the case of *Frank vs. Commissioners of Internal Revenue*, 51 Federal 2d, 923, 925 (CA 3rd), wherein the Court had before it a postnuptial agreement by which a husband and wife, prior to divorce, agreed that the husband should pay to the wife $40,000.00 in exchange for her divesting herself of her inchoate right in his realty.

The Court said at page 925:

> "Mrs. Frank, therefore, had an interest in the real estate, and there was no way by which she could be divested of this property by her husband, and the only way by which he could sell the property and give a clear title to it was by paying her the $40,000.00. This was not a gift to her husband, but was the price of her interest in her inchoate rights in the property."

We submit that the *Frank* case is more nearly in point on the issues than is the *O'Malley* case, and that the facts and circumstances in the instant case are even stronger than the *Frank* case by reason of the fact that at the time of the sale of the real estate by Davenport the marital relations had been completely severed by divorce.

It is therefore apparent that there is a conflict in the decisions of the Circuit Courts of Appeal on the issues presented in the instant case.

CONCLUSION

We, therefore, respectfully submit that the question presented here is in many respects one of first impression in the Courts of Appeal clouded by the conflict in decisions of the 8th, 3rd and 7th Circuits, and the question is one of such importance that unless finally determined by this Court, will conceivably result in confusion and complete uncertainty.

The problem involves no mere disagreement as to particular factual situations but arises from a substantial misconception of the applicable law concerning what may be considered a "cost basis" in reporting the sale of property.

It is therefore respectfully submitted that this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM—SEPTEMBER SESSION, 1959

No. 12713

ILLINOIS NATIONAL BANK, A BANKING CORPORATION, AS CONSERVATOR OF THE ESTATE OF EARL DAVENPORT, AND NELLIE DAVENPORT,
Plaintiffs-Appellees,

vs.

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois.

December 21, 1959

Before DUFFY, PARKINSON[1] and CASTLE, *Circuit Judges.*

CASTLE, *Circuit Judge.* This is an appeal by the United States of America from a judgment in the amount of $10,601.63 entered in favor of the Illinois National Bank as conservator of the estate of Earl Davenport, an incompetent person, and Nellie Davenport, the wife of Earl

[1] While Judge Parkinson participated in the hearing of oral arguments and a conference of the division judges above-named, he was not present at the time of, and did not participate in, the adoption of this opinion. He concurred in the result reached in this opinion.

Davenport in a suit for refund of an alleged overpayment of $15,231.12 in federal income tax for the year 1948.

Prior to July 25, 1947 Earl Davenport and Mayme Davenport were husband and wife. On July 18, 1947 Earl and Mayme Davenport entered into and executed a "Post Nuptial Stipulation and Settlement of Property Rights" and that part of the stipulation with which we are concerned is as follows:

1. That the Plaintiff, Mayme Davenport intends to file an Amended Complaint for divorce in the above entitled cause, and

2. The Defendant, Earl Davenport, will convey to the Plaintiff all his rights, title and interest by Quit Claim Deed in and to all real estate owned by the Plaintiff, Mayme Davenport; and the Plaintiff Mayme Davenport, shall Quit Claim to the Defendant all her rights, title and interest in the real estate owned by the Defendant, Earl Davenport, subject to the provisions hereinafter set forth.

3. That the Defendant, Earl Davenport, will pay to the Plaintiff, Mayme Davenport, the sum of Fifty-two Thousand Dollars ($52,000.00) in full settlement of all her right, title and interest in the real estate of the Defendant, and as settlement of her property right, claim for alimony or support money and including her attorney fees and court costs, said sum of money to be paid in the manner following:

(The stipulation then recites the method of payment.)

Paragraph 11 of said stipulation states as follows:

> It is understood and agreed that in case a decree is entered in this cause, this contract and each and all of the terms thereof shall be incorporated in such decree, and may be considered a part of such decree.

Thereafter, on July 25, 1947 the Circuit Court of Sangamon County, Illinois, in its decree dissolving the marriage

between Earl and Mayme Davenport, incorporated and approved the agreement in accordance with the terms above set forth. Earl Davenport and Mayme Davenport carried out the provisions of the contract and decree by executing quit claim deeds in favor of each other in respect to their separate properties and on August 7, 1947, Earl Davenport paid Mayme Davenport $52,000 as agreed in the post nuptial agreement. A portion of the land which Earl Davenport owned at the time of the settlement and divorce was sold on January 3, 1948, by Earl and his present wife, Nellie Davenport, for $120,221.75. In the joint return filed for the year 1948, the taxpayers, in computing an alleged loss on the sale of this land, included in full the $52,000 payment to Mayme Davenport as a cost of acquiring the land that was sold; which payment, in effect, they added to their cost basis of the land for the purpose of determining gain or loss. The $52,000 item was disallowed. On April 17, 1952, the Commissioner of Internal Revenue made a timely assessment of a deficiency in tax in the amount of $12,747.66, plus interest of $2,483.46. The total deficiency was paid, and on October 11, 1955, the taxpayers filed a timely claim for refund, which was denied on September 10, 1956. The taxpayers filed this suit for refund.

The District Court found that, of the $52,000 paid to Mayme Davenport, $5,000 was paid for her attorney's fees and was not attributable to the cost of acquisition of the land, but that "$47,000 was paid for release of her dower, homestead and rights of inheritance," and concluded that "the Director of Internal Revenue erred in disallowing the said $47,000 as a cost of acquisition basis." Judgment was entered against the United States on April 8, 1959, and notice of appeal was filed by the Government on June 5, 1959.

The contested issues are:

1. Whether, as a matter of law, the District Court erred in concluding that, for federal income tax purposes, a payment to a divorced spouse for release of her inchoate right to dower in real property may properly be added to the basis of the property in determining gain or loss from its sale.
2. Whether, on the basis of the evidence in the record, the District Court erred in concluding that the taxpayers sustained their burden of proving what portion of the $52,000 payment, if any, was for the release of inchoate dower or homestead rights in the property sold.
3. Whether the evidence in the record supports the District Court's finding that the taxpayers' unadjusted cost basis for the property sold was $66,575.25.

Under the Illinois law a former wife's inchoate right of dower is a mere expectancy. It is not a vested right. In the instant case the evidence clearly shows that the $52,000 payment was a lump sum general settlement of a marital dispute. In the case of *O'Malley v. Yost*, 8 Cir., 186 F. 2d 603, where the sole reason for such a payment was the estranged spouse's desire to sell the property it was stated that the money "which the taxpayer paid to his wife so that he could convey good title was not an expense of sale" within the meaning of the revenue laws. Here the payment was in no way connected with the sale of the property and we are of the opinion that the doctrine of the *Yost* case applies.

Neither can the payment to Mayme Davenport be held to have been a cost of defending or perfecting title to property. The evidence clearly shows that Earl Davenport had title to the property before the mutual exchange of quit claim deeds. The property was sold several months after the post nuptial agreement and divorce and it is

evident that it was a personal expenditure within the terms of Sec. 24 (a) (1) of the Internal Revenue Code of 1939, and as such had no tax consequences.

The only evidence in the record to substantiate the original cost unadjusted basis of the land was the income tax return for the year 1948 which stated the cost at $66,575.25. The return was admitted in evidence as plaintiffs' Exhibit "A" pursuant to stipulation which simply provides that the exhibit is the original joint income tax return for 1948 which Earl and Nellie Davenport filed. We have searched the record and can find no stipulation or admission that either the unadjusted basis in the amount of $66,575.25 as claimed in the return or the adjusted basis to which the $52,000 payment had been added were correct. The taxpayers had the burden of proving that this was a correct basis for determination of their tax liability. *Decker v. Korth*, 219 F. 2d 732 (C.A. 10th), certiorari denied, 350 U.S. 830.

The government concedes the amount of $35,605.00 as a correct unadjusted cost basis for the land here involved. We are of the opinion that this is the correct unadjusted cost basis and by using that figure the Internal Revenue Service correctly computed the tax deficiency assessed and paid.

The judgment of the district court is reversed.

REVERSED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.